

Fee Waiver Request

Freedom of Information Act request for records relating to NSPS and NESHAP reporting by North Dakota oil and gas facilities

Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and EPA's implementing regulations, 40 C.F.R. § 2.107(l), the Environmental Integrity Project (EIP) requests that all charges (e.g., search, review, and duplication fees) incurred in connection with this request be waived. The legislative history of FOIA indicates that the fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005) (internal quotations and citations omitted). EIP is a national nonprofit organization dedicated to protecting the environment and reducing pollution by improving compliance with major federal environmental laws. One of EIP's main areas of focus is the Clean Air Act and (among others) the oil and gas facilities regulated under the Act. EIP's work combines research, reporting, and media outreach.

As discussed below, EIP satisfies the two-pronged test for a fee waiver established in FOIA and outlined in EPA's implementing regulations because: (i) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government," and (ii) disclosure of the information "is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

I. Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of the operations or activities of government.

EIP qualifies for the fee waiver because the requested information will "contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1), (2).

A. The subject of the request concerns the operations and activities of the government.

EIP seeks certain records related to records and documentation submitted to EPA Region 8 under EPA's Subpart OOOO New Source Performance Standards (NSPS) and Subparts HH and ZZZZ National Emission Standards for Hazardous Air Pollutants (NESHAP), all of which were promulgated under the Clean Air Act. Because these regulations were promulgated by EPA, and because the records sought directly related to EPA's role as a regulator and enforcement authority, the records EIP seeks necessarily involve the operations and activities of the government.

B. The disclosure is likely to contribute significantly to public understanding of the government's operations or activities.

The Subpart OOOO NSPS and Subparts HH and ZZZZ NESHAP were important rulemaking under the Clean Air Act to regulate hazardous air pollutants and other pollutants emitted by oil and gas facilities. These regulations are important to protect public health, but they can only do so if regulated sources report sufficient information and documentation to show that they are complying with the requirements of these regulations — and if EPA and/or state regulators review submissions by sources and enforce any violations of these regulations. Here, Title V permits for certain oil and gas facilities in North Dakota state that EPA Region 8 -- not the North Dakota Department of Health -- is the “implementing and enforcement authority” for the Subpart OOOO NSPS regulations or the Subpart HH or Subpart ZZZZ NESHAP regulations. It is important to confirm that the documentation required by these regulations is indeed being submitted to EPA Region 8 and that EPA indeed has this information available for review and enforcement.

EIP plans to share the requested records with other non-profit advocacy organizations such as the Sierra Club and/or North Dakota-based organizations. The requested records will enable EIP, other non-profit advocacy organizations and the greater public to fully understand and assess reporting by North Dakota facilities under the NSPS and NESHAP regulations and determine whether reporting by these facilities complies with the Title V and other requirements of the Clean Air Act. Similarly, the requested records will enable EIP, other non-profit advocacy organizations and the greater public to fully understand and assess whether EPA has the required information for enforcement of its regulations that apply to North Dakota oil and gas facilities. EIP intends to use the requested records, as appropriate, to inform the public about any problems related to reporting by these facilities through our website, listservs, and/or reports, all of which are available free of charge to interested parties. Other non-profit advocacy organizations with which we share the records likely will do the same. As necessary, EIP and partner organizations will also use the requested records to inform the news media — and therefore the greater public — about any gaps in reporting by oil and gas facilities and any gaps in review by EPA or the state of North Dakota.

The requested information is not already accessible through EPA’s website, as EIP is only requesting actual copies of documents and information not already accessible online. Concerned members of the public will only be able to gain a meaningful understanding of reporting by North Dakota oil and gas facilities and EPA’s oversight of that reporting if EPA discloses the requested records.

When EPA provides the requested documents, the public’s understanding of this specific reporting and EPA’s review of the reporting “as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent.” *See* 40 C.F.R. § 2.107(l)(2)(iv). Because EIP, other environmental non-profits and the public only know that Title V permits for these North Dakota facilities state that information is to be reported to EPA under these NSPS and NESHAP regulations (not that the information is actually submitted to EPA by these facilities or that EPA has the required reports to review and take enforcement if necessary), public understanding of this reporting (which directly bears on EPA’s efforts to protect public health and welfare related to hazardous air pollutants and other pollutants) will undoubtedly be enhanced to a significant extent by disclosures in response to the requests. EIP and other partner environmental non-profits can convey information of the type requested to a

broad audience of interested organizations and citizens, and the increase in public understanding “compared to the level of public understanding existing prior to the disclosure” will certainly be “significant” under any reasonable interpretation of the term.

In sum, the requested documents are likely to contribute significantly to public understanding of EPA’s operations and activities.

II. Obtaining the information is of no commercial interest to EIP.

The second element of the fee waiver analysis concerns the requester’s “commercial interest” in the information requested. There are two relevant inquiries to determine whether the information requested is “primarily in the commercial interest of the requester,” and a fee waiver is appropriate if either inquiry is satisfied. 40 C.F.R. § 2.107(l)(3). The first inquiry is whether the requester has a “commercial interest that would be furthered by disclosure.” 40 C.F.R. § 2.107(l)(3)(i). Here, as a 501(c)(3) non-profit organization, EIP has no commercial, trade or profit interest in the material requested. EIP will not be paid for or receive other commercial benefits from the publication or dissemination of the information requested.

The second inquiry concerns the requester’s primary interest in the disclosure. *See* 40 C.F.R. § 2.107(l)(3)(ii). The requested materials will allow for a more thorough analysis of reporting by North Dakota oil and gas facilities under EPA’s NESHAP and NSPS regulations and whether that reporting and EPA’s review of that reporting are consistent with the Clean Air Act. Even if EIP did have a commercial interest in the requested materials (it does not), a complete fee waiver would be appropriate under this second inquiry because EIP’s primary interest in the materials is non-commercial, i.e., to inform the public about the operations and activities of the government. Therefore, the “disclosure of the information . . . is not primarily in the commercial interest of” EIP, and a fee waiver is warranted. 5 U.S.C. § 552(a)(4)(A)(iii).

Conclusion

In light of the foregoing, the requested records bear directly on identifiable operations and activities of EPA, will contribute significantly to a broad public understanding of important matters relating to government functioning and federal laws, and will not serve any commercial interest on the part of EIP. Therefore, a fee waiver is appropriate.